

Yeshwant and Others

Vs

The State of Maharashtra

Brahmanand Gokul Prasad Tewari

Vs

State of Maharashtra

Criminal Appeal Nos. 175 Of 1969 And 90 Of 1970

(A. N. Grover, M. H. Beg JJ)

20.04.1972

JUDGMENT

BEG, J. -

1. These appeals, by Special Leave, are directed against the judgment of the High Court of Bombay allowing an appeal of the State of Maharashtra against the acquittal of the appellants by the Sessions Judge of Bhandara. The appellants, Yashwant, Suraj Lal, and Brahmanand Tiwari were convicted under Section 302, read with Section 34, Indian Penal Code, for the murder of Sukal and sentenced to life imprisonment. The appellants Rupchand and Bhadi alias Ramkishore were convicted under Section 307, read with Section 34, Indian Penal Code, and sentenced to seven years' rigorous imprisonment for having made a murderous assault on Zingu who escaped and lived to depose about the attack upon him and the murdered man, Sukal, his relation and companion. It appears from the prosecution case, that Sukal and Zingu, while returning from a fishing expedition, were waylaid and attacked by five persons, one of whom was armed with an axe, with which he killed Sukal, and another with a knife, with which he stabbed Zingu thrice, at about 2.30 a.m. on September 15, 1966, at a place called Harartola of village Kati near an electric lamp post. The evidence also disclosed that apart from Zingu (P.W. 8), the injured man, there were two more eye-witnesses, Babaji (P.W. 17) and Jiwan (P.W. 18), who came from the direction opposite to that of victims.

2. Zingu (P.W. 8) is said to have managed to extricate himself from his assailants with a jerk or push and to have fled crying for help. He also stated that, while escaping, he saw Babaji (P.W. 17) coming from a side road with a lantern in his hand. Zingu rushed into the house of Jainarain situated at a distance of about 200 feet from the lamp post. Then, Dr. Narsing Galole (P.W. 2), a Medical practitioner, who was sent for, came and attended to the injuries of Zingu after having seen Sukal lying unconscious near the lamp post. Zingu was said to be in pain but able to speak. Dr. Galole said that Zingu told him :

"I was caught by Rupchand and I was assaulted by Suraj. Sukal was near me. He was caught by Yashwant and Bhadya Master and Tiwari attacked Sukal."

3. Doctor Galole then sent for a bus. But before the bus could arrive, Sukal had expired. Therefore, the doctor took only Zingu in the bus to the Hospital at Gondia. The Doctor also lodged a First Information Report at 7.05 a.m. on September 15, 1966, at Police Station, Gondia, in which it was stated that Zingu had said that he had been beaten by Suraj Koshti while Rupchand Koshti had held him, and that Sukal Pehlwan "had been held by Police Patil, Yashwantrao Turkar, and, when Maharaj from Gondia had been asked to beat, he had showered blows". Thus, although it was in the evidence of Dr. Galole that Zingu had named five persons, yet, the First Information Report lodged by Dr. Galole omits the name of Bhadya Master alias Ramkishore. The omission from the First Information Report, which could only be used to cross-examine Dr. Galole, was not put to him so that he had no opportunity to explain it. Hence, nothing much could be made out of it.

4. One Chandanlal (P. W. 12) was said to have accompanied Dr. Galole to the scene of occurrence, and, thereafter, to the house of Jainarain and to have heard what Zingu and other eye-witnesses had said there. He deposed that Zingu had said "Yashwant and Suraj caught hold of Sukal and Tiwari gave him blows. Bhadya Master caught hold of me and Rupchand gave me blows". This statement was in accord with the consistent statements of the three eye-witnesses at the trial. Chandanlal was Sarpanch of the Gram Panchayat of Kati since 1966. He admitted that Harlal, the elder brother of Yashwant, was the Sarpanch until 1966, and that Chandanlal was his Deputy Sarpanch. Chandanlal also said that Sukal deceased had also been a candidate at the election. His evidence showed that Jainarain was his brother. We do not see why the evidence of such a witness should be rejected simply because he had taken part, as a Sarpanch naturally must, in village elections, or, because Harlal, the elder brother of one of the accused, and Sukal, the deceased, had also done so even if their parties were different. The Trial Court had observed that the election was an old affair and could hardly provide any immediate motive for either the attack or a false implication.

5. Zingu's statement shows that he knew each of the five accused quite well. But, his evidence was discarded by the Trial Court mainly because he was said to have given inconsistent accounts at various stages as regards the actual person or persons who had either held or inflicted injuries upon him or Sukal. There was divergence between what Dr. Galole and Chandanlal remembered about it as noticed above. In his evidence at the trial, Zingu stated that Bhadya Master had held him while Rupchand stabbed him on his back twice. This is what he stated before Chandanlal according to that witness. His purported dying declaration made at 7.30 a.m. on September 15, 1966, at Gondia Hospital, before a Taluka Magistrate, was put to him to bring out inconsistencies. He stated : "My statement was recorded by Taluka Magistrate. I do not recollect that I said then as I was not fully conscious when I made that statement". This former statement before a Magistrate, in the form of a dying declaration, was admitted in evidence. Zingu was asked whether he had not admitted it to be correct when he gave evidence in Court on an earlier occasion. He said : "I again say that I did give the statement before the Taluka Magistrate and now read over to me". It seems to us that this was a straight-forward answer. The serious condition of Zingu at the time when his purported dying declaration was recorded has to be borne in mind. A look at the dying declaration shows that he had stated there first that he was struck by Mukadam Patel, and, after that, he said that he was struck by somebody who could be "a guest from Gondia". He certainly indicated, before the Magistrate, who the members of the assembly of five were, but he was not at all clear as to which person did what. The so-called dying declaration, extracted as a result of questions put to him, gives a good indication of his rather confused state of mind, which did not mean that he was untruthful. The dying declaration runs as follows :

"Q. - When were you admitted in the hospital ?

Ans. - Approximately at 5.30 o'clock in the early hours of this day.

Q. - What are the portions of body where you have sustained injury ?

Ans. - On back.

Q. - Which is the weapon that is responsible for these injuries ?

Ans. - (Those injuries are caused) by a katyar.

Q. - Had a quarrel taken place in the village ?

Ans. - No quarrel had taken place.

Q. - Who assaulted you with the help of a Katyar ?

Ans. - Mukadam Patel.

Q. - When was the assault on you made ?

Ans. - (I was assaulted) at 12 night in Kati proper in Marar Toli locality.

Q. - How were you concerned with the dispute ?

Ans. - I had no concern. In order to see the Seth, I was going to the pedhi. At that time, Mukadam Patel said, "Maro saleko". First Sukal was struck with the Katyar. He fell down later on, a blow was delivered on me.

Q. - How many men were there with Mukadam Patel ?

Ans. - Rupchand Patel, Bhadya Master and Suraj were (with him).

Q. - Who has made a direct assault on you ?

Ans. - There was a guest from Gondia with Mukadam Patel. He had struck me with the Katyar. Mukadam Patel and others had held me.

Q. - Do you like to say anything in particular ?

Ans. - No".

6. The trump card, however, of the defence was the statement of Dr. Kale (P. W. 7) who had examined Zingu and admitted him into the Gondia Hospital and found the following injuries on him :

"(1) Incised wound triangular in shape 4 cm. by lung deep left scapular area. There was a lot of surgical emphysema surrounding it. No free blood could be detected in the chest cavity by percussion.

(2) Incised wound 4 cm. x 1 cm. x bone deep on the spines of 12th dorsal and 1st lumber vertebra.

(3) Incised wound 1 cm. x 0.25 cm. x cartilage deep on the front pinna right ear. Cartilage below was fractured."

7. Dr. Kale deposed that he felt that the condition of Zingu was so serious that he asked the prosecuting Sub-Inspector to get Zingu's dying declaration recorded. He also said : "I questioned Zingu and he told me that he was assaulted by somebody at 2 or 3 a.m. It was he who told me that he did not know the names of persons who had attacked him. He told me that his relative Sukal had died on the spot."

8. The Trial Court observed : "The evidence of Dr. Kale, supported by the Memorandum of the medical case history, prepared by him on the spot taken the wind out of the sails of prosecution story. At any rate, Zingu's reluctance or inability to tell Dr. Kale the name of his assailants is difficult to understand if he had seen the miscreants and if he had named them before Dr. Galole, Chandanlal, and Dr. Pullarwat". Relying implicitly upon the evidence of Dr. Kale, the Trial Court had come to the conclusion that Zingu must be a deliberately untruthful witness, or, at least, a witness who had been persuaded by others to believe that the five accused had waylaid Sukal and Zingu. It held that this accounted for his conflicting statements. The finding implied that not only Chandanlal but also Dr. Galole's testimony was unacceptable.

9. Before we take up the evidence of other witnesses, we may observe that the High Court had given a better reason for distrusting the evidence of Dr. Kale than the Trial Court had given for relying on it so completely. The High Court said "..... it is significant to note that it is during cross-examination that Dr. Kale as P.W. 7 has been asked the question about this entry in the case record. The addition of the word 'not' between the words 'are' and 'know' is so obvious and patent that one should have expected an explanation therefor coming from the witness rather than from the Judge without any material to that effect justifying the explanation."

10. The addition of the word 'not' in the purported dying declaration was in a different ink altogether. The Trial Court had also found that it was a subsequent addition but had attempted an utterly conjectural explanation by holding that the insertion was made by Dr. Kale to put his record right afterwards as there had been an honest slip of the pen by him. The Trial Court said :

"The word 'not' in this memorandum prepared by Dr. Kale does appear to have been written subsequently in different ink. But then, it will appear from the entire case record that Dr. Kale had stopped writing after he advised the police to obtain the dying declaration of Zingu and had resumed writing after the dying declaration was recorded. The word 'not' in the first portion of the Memorandum does appear to be in different ink, but it would not be right to say that this was a deliberate interpolation to distort facts. In my view the word was added, because, originally there must have been an honest slip of the pen. Otherwise Dr. Kale would not have stated in the first line that somebody had assaulted Zingu. Instead, he would have named the persons who were the assailants. This circumstance, therefore, that in the medical case record, prepared by Dr. Kale at 5.30 a.m. on September 15, 1966, it has been stated that the names of the assailants were not known is a very telling circumstance. The importance of this circumstance is heightened because of Zingu's own admission that when he was taken to the Gondia Hospital, the doctor who treated him did ask him as to who were the persons who had assaulted him. Surely, if Dr. Kale had asked that question to Zingu and if Zingu had given out the names of his assailants, then there was no reason why Dr. Kale should have refrained from mentioning these names in

the memorandum prepared by him while he was sitting by the side of the bed of Zingu. It is also important to note that it was Dr. Kale who sent for the police to record a dying declaration of Zingu and he was himself present when the dying declaration was recorded and he certified at the foot of the dying declaration that Zingu was in his senses and mentally clear throughout the dying declaration. It is, therefore, difficult to believe that Dr. Kale would prepare a false record after knowing the names of the assailants from Zingu in answer to a question put to him by him. On the contrary it is highly probable that Zingu did not tell Dr. Kale the names of his assailants".

11. It is difficult to understand why the Trial Court wanted to avoid the use of the word "deliberate" to describe a subsequent addition in a different ink which could only be and was admitted by Dr. Kale himself to be "deliberate" unless it meant to convey that distortion was not deliberate. If the Doctor had made the insertion afterwards in a different ink, it meant, as the Trial Court's findings indicated, that this was done after he had heard the dying declaration. We fail to understand how Dr. Kale could have honestly made such an alteration at all in the head ticket after having heard the dying declaration, even if we were prepared to believe that, in the special circumstances of this case, it was not unnatural for Dr. Kale to be so anxious to find out and record a dying declaration himself before a Magistrate had come and recorded the purported dying declaration. After having been taken through the evidence about the two "dying declarations" - one recorded unofficially by Dr. Kale and corrected by him afterwards and another recorded about two hours later by a Magistrate in the presence of Dr. Kale - we have no hesitation in agreeing with High Court that the statement, put in Zingu's mouth by Dr. Kale, could not have been correctly recorded by Dr. Kale and it had to be totally ignored. It certainly could not knock the bottom out of the prosecution case, as the Trial Court thought that it did.

12. In the circumstances stated above, the High Court was, in our opinion, quite right in reassessing the prosecution evidence from a correct angle. It rightly held that, even if Zingu's evidence was not, by itself, sufficient to establish the prosecution case, the defence had not got over the evidence of Babaji and Jiwan, who were quite natural witnesses. They had come near enough to see and recognise the assailants in good enough light before the miscreants ran away. The evidence of these two eye-witnesses was strongly corroborated by what Dr. Galole and Chandanlal had stated. The High Court noticed that the Trial Court had itself rejected the defence suggestion that there was a conspiracy between Dr. Galole and Chandanlal, arising out of village factions, to implicate the accused persons and to instigate Zingu into naming them. It had held that the attempt to shake the testimony of Dr. Galole by cross-examination had completely failed. We may add that, if there had been an attempt to implicate and involve five innocent persons deliberately in a serious case of murder, and to support it by perjured evidence, the evidence of Zingu would probably have been free from the infirmities it contains due to the sudden nature of the attack from behind upon him. It was not unnatural for Zingu to have been confused and yet to have had a sufficient idea as to who those five persons were. It was also quite easy for him to have seen Babaji, who was coming with a lantern from the opposite direction, when Zingu passed him while running towards Jainarain's house. Zingu was not asked how he made out the identities of his assailants or of Babaji. In the absence of any cross-examination on these points, we do not think that his testimony could be rejected as useless either on the ground that he must have had only a fleeting glimpse of the five men who had waylaid and attacked Sukal and Zingu or because he could not have seen Babaji on the scene at all. It is one thing to make out the identities of several previously known persons who waylay and attack. It is quite another matter to be able to remember and describe correctly afterwards the exact words and actions of each.

13. We think that the evidence of Babaji and Jiwan is even more important than that of Zingu. If Zingu was attacked from behind, as he undoubtedly was, Babaji and Jiwan would have had a better opportunity of seeing the actions of each of the assailants in front of them than Zingu whose attention must have been directed more towards extricating himself from the clutches of his own assailants from behind. This is exactly what we find from the evidence. The Trial Court had failed to see that some of the very reasons given by it for holding that the impressions on the mind of Zingu must have been confused were not present at all in the case of Babaji and Jiwan.

14. The Trial Court had started from the basically erroneous assumption that Zingu's evidence provided the real foundation of the prosecution case which had been demolished by Dr. Kale's evidence and that Babaji and Jiwan were more "prattling" (the very word used by the Trial Court) witnesses who were itching to figure, in the words of the Trial Court, "once in a life time", as heroes in a Drama for the unfolding of which they drew entirely upon their imaginations to the extent that they practically hypnotised Zingu into making false assertions with regard to the identities of the five members of the party which waylaid and attacked him and Sukal. There is no evidence on the record to show that Zingu had a feeble mind or that Babaji and Jiwan had such a powerful hold upon him as to be able to make him say whatever they wanted. Nor is there any evidence upon the record to show that Babaji and Jiwan had a tendency to indulge in such wonderful feats of imagination as to invent, so quickly and without any preconcert, a story involving five innocent men in the grave offence of murder without any animus or motive shown on their part for behaving in such a dastardly fashion.

15. The Trial Court emphasized what is considered to be the "incessant prattling" of Babaji, as contracted with his silence at the time when the Panchnama was drawn up. There is no evidence that Babaji was abnormally loquacious at Jainarain's house. It was natural for him to have said, at the earliest opportunity, what he saw. It indicates that he had not cooked up a story subsequently. After he had already said what he had seen, there was no occasion for him to repeat it at the time when the Panchnama was drawn up. Indeed, if he had behaved in this fashion his conduct would have become suspicious. The Trial Court itself had believed that Babaji was a natural witness of the locality whose presence at the spot was explained by the fact that it was the night during which a symbolic "Marbat" (representing a corpse) had to be carried during the night by a person belonging to the caste of Babaji and Jiwan.

16. Babaji was just near the fork of the road on which the lamp post was located. We find, from the site plan, that there was no obstruction whatsoever between the place from which he is shown to be moving forward in the direction of the lamp-post. Babaji and Jiwan must have moved a few steps forward on hearing the cries of Zingu who passed Babaji only at a distance of two feet as he ran towards the house of Jainarain. The finding of the High Court, that Babaji was only 25 steps from the place where Sukal was attacked, before the very eyes of Babaji and Jiwan, is in consonance with the evidence on record. The view of the Trial Court that he was probably not in a position to see what occurred in front of him is entirely conjectural and unsupported by anything brought out either in the cross-examination of Babaji or by a reference to the site plan.

17. It is true that Jiwan had stated, in the Committing Magistrate's Court, that Suraj, Rupchand, and Bhadu had caught Zingu after Sukal had fallen down and had also stated there that Yeshwant appellant was not there. At the trial, he admitted frankly that these were mistaken statements. He had corrected these errors of observation or memory when he deposed at the trial. We do not think that such errors are uncommon in the testimony of the most truthful witnesses. Indeed, they indicate that the evidence of Jiwan was untutored. All we can say is that Babaji's evidence is more clear and

emphatic.

18. Another ground given by the Trial Court for discarding the evidence of both Babaji and Jiwan was that each had said that there was some adhesive tape on the neck of the appellant Brahmanand Tiwari who was not known to them from before. The Trial Court was of the view that it was absurd for Babaji and Jiwan to say that they saw the adhesive tape on the neck of Brahmanand Tiwari in the light of a lamp at a distance of 175 feet and recognised him because of that instead of mentioning the beard of Brahmanand which was far more prominent and obvious. We find that this view of the Trial Court was based on a misreading of the evidence. What Babaji had said was that he had identified the previously unknown man "by his face and from the tape on his neck". Immediately before that, he had stated : "I had identified him before the Taluka Magistrate, Gondia". Therefore, it is apparent that the face, which included the beard, was mentioned by Babaji. It also appears that he meant to say that he identified him before the Taluka Magistrate because of the adhesive tape. At any rate, it was not clarified, by the cross-examination of this witness, that he meant to say that he saw the adhesive tape at the time of the occurrence. The witness was certainly advancing and probably did advance towards the party of assailants sufficiently to see them well before they ran away. Jiwan had also stated that he had identified "the new man" from Gondia "by his face and the tape". Again, it was not clarified, even by question put by the Court, whether the adhesive tape was seen by the witness only at the time of the identification parade or also at the time of the attack. However, even assuming that they could not have seen the tape at the time of the attack but had said that they did see it, witnesses of identification are known to confuse the image they see at the time of the identification parade with what they think they had also seen at the time of an occurrence. The cross-examination of these witnesses left much which had to be there if their veracity was seriously challenged.

19. The infirmities in the test identification parade of a previously unknown bearded man, whom even Zingu could only described as "a guest from Gondia", does make the evidence as to the identity of the bearded man who attacked Sukal with an axe doubtful. Neither Babaji nor Jiwan knew him from before and described him as "a new man". The Trial Court has also observed that the appellant Brahmanand had a beard. It is clear from the admission of Babaji and Jiwan that Brahmanand was brought by the Police and made to sit outside the Court of the Magistrate where these witnesses also waited before the identification parade began. The Magistrate took no precaution to see whether other similar bearded men joined the parade. There were only five other persons in the parade. Apparently, Brahmanand had a tape on his neck at that time. The identification Proceeding was, therefore, rightly described by the Trial Court as "a farce".

20. As we have already observed, the confusion with which Zingu's mind must have been covered, as a result of the sudden attack upon him, made it difficult to rely upon his powers of observation singly. Even he could have mistaken some other bearded man for the "Maharaj from Gondia". Zingu did not apparently even know the name of the Maharaj to be able to give it. In addition, we find that this appellant is a night watchman in the Irrigation Department of Zila Parishad who was posted at Gondia. The Investigating Officer, Datatray Gokhale (P.W. 19), stated that he had examined the attendance register and found him absent on September 15, 1966, at night. Neither side summoned the actual attendance register so as to get the entry with regard to the bight between 14th and 15th September, 1966, with which we are concerned, proved. The result is that the evidence of the identity of Brahmanand as the assailant who had actually used the axe on Sukal remains involved in doubt which is not removed by any reliable corroborative evidence. It is well known that evidence as to identity, particularly of previously unknown persons, is a deceptive kind of evidence which has led to miscarriages of justice sometimes. We, therefore, think that Brahmanand Tiwari appellant is

entitled to the benefit of the doubt emerging from the unsatisfactory nature of evidence as to his identity.

21. We may also mention here some circumstantial evidence tendered by the prosecution. Some clothes believed to have been stained with blood were recovered by the police on September 15, 1966, from the houses of Rupchand, Yeshwant, and Bhadu, and, on September 19, 1966, from the house of Brahmanand Tiwari. But, except for stains on the dhoti recovered from the house of Yeshwant, it could not be established that the stains were of human blood as the clothes appeared to have been washed. As regards the blood spots on the dhoti of Yashwant it was not established that the blood group "B", of the human blood on this dhoti, was of either of the two victims. The blood of Sukal was of group "A". The connection of this evidence with the occurrence under consideration was not shown by anything on record.

22. Then, there were some contusions on the body of the appellant Bhadu and a contusion on the forehead of Rupchand approximating in duration the time which had elapsed between the occurrence and their examination. The Trial Court had accepted the explanation of Bhadu that he had sustained injuries when he fell from his bicycle. It had, however, not accepted the explanation of Rupchand that the injury on his forehead was due to the beating by the police because Rupchand had appeared on more than one occasion before the Judicial Magistrate for remand during the trial and had positively stated that he had no complaint against the police. We think that the minor injuries on the bodies of Rupchand and Bhadu are significant because they fit in with Zing's version that he had jerked himself free. This 'Jerk' when he was struggling for his life, could not have been a gentle push. We may also mention here that each of the accused denied participation in the attack but gave no evidence in defence.

23. We find that the High Court had noticed the correct principles to be observed in appeals from acquittals before reappraising the evidence in the case. It had pointed out that erroneous assumption of the Trial Court, which were unsupported by evidence, had led to the acquittal of the accused. If we find ourselves in agreement with the view of the High Court, as we do, that the evidence of the two eye-witnesses, who were in a better position to see and describe the occurrence than the victim Zingu, is natural, credible, and unshaken and is also fully corroborated by other good evidence in the case, we do not think that the mere fact that the prosecution had not given evidence either to corroborate Zingu's assertions that he and Sukal had gone out fishing during the night or to make out a good enough motive for murder would justify the rejection of the evidence of the three eye-witnesses. It was suggested by the prosecution that the defeat of Harlal at the Panchayat elections must be rankling in the mind of his brother Yeshwant. But, there is no evidence to show what Sukal and Zingu had to do with that or why the other accused should join hands with Yeshwant. The defence suggestion, in the cross-examination of witnesses, that the occurrence took place elsewhere is belied by the finding of the body of Sukal a few paces from the lamp post, but another suggestion that Sukal was a bully, who went about with Zingu, collecting money, may conceivably give a clue to the possible motives of the accused. The discovery of the true motive for a crime is not imperative in every case.

24. The High Court had, however, not examined the evidence against each accused individually. Hence, the weakness in the evidence of identity given against Brahmanand Tiwari appellant escaped due attention in the High Court. We have, therefore, thought it fit to correct this error and give the benefit of doubt to this appellant.

25. It has been strongly contended by Mr. Desai, on behalf of the remaining appellants, that they too

are entitled to the benefit of doubt about the whole case which thus emerges. He has relied upon *Krishna Govind Patil v. State of Maharashtra*, ((1964) 1 SCR 678 : AIR 1963 SC 141 : 1963 (2) Cri LJ 351) and *Jagir Singh v. State of Punjab* ((1967) 3 SCR 256 : AIR 1968 SC 43 : 1968 Cri LJ 89).

26. In *Krishna Govind Patil's* case (supra) this Court held that, where four persons were charged under Section 302, read with Section 34, I.P.C., the effect of finding that three of them, who were specifically indicated as the "other participants", were entitled to the benefit of doubt, it was not possible to convict the fourth accused under Section 302, read with Section 34, I.P.C. It is clear that, in that case, the only remaining accused could, if at all, be convicted under Section 302 simpliciter. Apparently, the evidence was not good enough to sustain the conviction of the remaining accused person singly. We do not think that this decision, which depends upon its own facts, as criminal case generally do, lays down any general principle that, where the identity of one of the participants is doubtful, the whole case must end in acquittal. Such a question belongs to the realm of facts and not of law.

27. This Court said in *Krishna Govind Patil's* case (supra) : "There is not a single observation in the judgment to indicate that persons other than the said accused participated in the offence, nor is there any evidence in that regard". In the case before us, there is evidence that the man who used the axe on Sukal was a man who looked like *Brahmanand Tiwari*, the appellant, and could be this accused himself. We are, however, not satisfied that the identity of the man who used the axe on Sukal is satisfactorily established as that of the appellant *Brahmanand Tiwari*. In such a case, we think that the remaining accused persons could be convicted with the aid of Section 34, I.P.C. for the offences they committed. Indeed, if five persons are lying in wait for two to pass and then pounce upon them so that three are engaged in attacking one and two attack the other, it may be difficult to hold, as the High Court has done, that Sections 147 and 149, I.P.C., would be inapplicable. But, as the accused have been acquitted of the charge of rioting, we cannot enter into this question and convert this acquittal into a conviction under Section 147, I.P.C., at this stage.

28. In *Jagir Singh's* case (supra), it was pointed out that Section 34 IPC is intended to meet a case where members of a party act in furtherance of a common intention of all but it is difficult to prove the part played by each of them individually. This case helps the prosecution and not the appellants. The only part of the prosecution case on which we entertain a reasonable doubt is the identity of the man who attacked Sukal with the axe. The benefit of this doubt can only go to the appellant *Brahmanand Tiwari* and not to the other accused persons who were known well to each eye-witness.

29. The result is that we think that the case against four out of the five appellants is established beyond any reasonable doubt. But, we doubt whether the identity of the fifth man, who was certainly there, is satisfactorily established as that of *Brahmanand Tiwari*. Accordingly, we allow the appeal of *Brahmanand Gokul Prasad Tiwari* and acquit him of all the charges levelled against him. He shall be released forthwith unless wanted in some other connection. The appeal of the four remaining appellants is dismissed and their convictions and sentences are maintained.

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